
DATE: January 23, 1992
CASE NO. 87-ERA-17

IN THE MATTER OF

PATTY S. MIRIELLO,

COMPLAINANT,

v.

CAROLINA POWER AND LIGHT COMPANY,

RESPONDENT,

AND

CHARLESTON NAVAL SHIPYARD,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND ORDER TO SHOW CAUSE

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and the implementing regulations at 29 C.F.R. Part 24 (1991). Prior to the scheduled evidentiary hearing, the Administrative Law Judge (ALJ) issued, on September 28, 1987, and November 17, 1987, respectively, the [Recommended] Order Granting Motions to Dismiss (R.O.) and the [Recommended] Order Vacating in Part Order Granting Motions to Dismiss, which are now before me for review. *See* 29 C.F.R. § 24.6(a).

In response to the Secretary's Order Establishing Briefing Schedule, Respondent Carolina Power and Light Company (Carolina Power) filed a brief in support of the R.O., reiterating the arguments made before the ALJ in support of its motion to

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dismiss. Respondent Charleston Naval Shipyard (the Shipyard) and Complainant did not submit briefs before the Secretary.

Upon review of the entire record, I conclude that it was proper for the ALJ to rule on Respondents' motions to dismiss rather than proceed to an evidentiary hearing. Further, although I do not fully agree with the ALJ's rationale, I agree, on the basis of the record before me, with his ultimate decision to grant the motions and to dismiss the entire complaint. The circumstances require, however, that I provide the parties a final opportunity to show cause, if any, why the case should not be dismissed in accordance with this decision.

BACKGROUND

Complainant was employed by Carolina Power as a health physics technician from February 1985, until August 30, 1985. In November 1985, she was employed by the Navy as a nuclear engineer at the Shipyard and, according to Complainant, was terminated on July 25, 1986. Subsequently, Complainant filed a complaint alleging that both of these employers discriminated against her in retaliation for protected whistleblowing activity.

Complainant's allegation against the Shipyard was investigated and determined by the Wage and Hour Division, U.S. Department of Labor, Columbia, South Carolina, while her allegation against Carolina Power was handled by the division in Raleigh, North Carolina. On February 17, 1987, the area director in Columbia issued a notice of determination that Complainant's allegations against the Shipyard were unprovable, and on February 24, Complainant timely requested a hearing. On March 4, the Raleigh area director determined that Complainant's allegations against Carolina Power also could not be substantiated. The record, however, contains no request for a hearing following issuance of this second letter of determination.

The case was assigned to the ALJ on or about March 11, 1987. At Complainant's request, the ALJ granted Complainant additional time to secure counsel before scheduling the hearing. Although Complainant had been represented by an attorney during the investigations, the attorney declined to continue. Before Complainant secured new counsel or the ALJ scheduled a hearing, the Shipyard and Carolina Power each filed motions to dismiss, dated April 28 and May 29, respectively. The Shipyard asserted that: (1) the Act is inapplicable to the Navy and the Shipyard; (2) Complainant did not engage in protected conduct while employed at the Shipyard; and (3) the complaint was untimely filed. Carolina Power moved for dismissal as a party on the following grounds: (1) Complainant never appealed the preliminary determination in Carolina Power's favor; (2) the complaint was untimely filed; and (3) the Act is inapplicable to

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Carolina Power because it was not Complainant's "employer" at the time of the alleged retaliatory actions. With regard to its

first argument, Carolina Power offered proof that the certified letter of determination in its favor was returned unclaimed. It argued, however, that Complainant nonetheless received both personal and constructive notice of the determination.

On June 5, the ALJ issued an Order advising the parties that Carolina Power's motion would not be considered until Complainant either had obtained counsel or had sufficient time to obtain counsel. He ordered Complainant to list all her attempts to obtain counsel or to provide the name of her counsel. Complainant responded by letter dated June 25, and intimated that she was awaiting responses from two possible legal representatives.

On July 23, the ALJ issued another Order, thoroughly detailing all the events that had transpired in the case and concluding that a hearing should be scheduled since Complainant had been given a reasonable opportunity to obtain a representative. He ordered the parties to submit "avoid dates" for the month of October and ordered Complainant to file a response, if any, to the pending motions.

Although Carolina Power and the Shipyard responded to the ALJ's July 23 order, Complainant did not. On August 12, the ALJ issued a Notice of Hearing, certified mail/return receipt requested, scheduling the hearing for October 27. Although not acknowledged by the ALJ, the return receipt on Complainant's notice was signed by one Jimmy P. Obi as agent. The receipt also bore a new address for Complainant, presumably entered by the postal officer.

Subsequently, both Carolina Power and the Shipyard filed motions, urging the ALJ to rule on the pending motions to dismiss so that they might avoid the undue burden of preparing for hearing. On September 28, the ALJ granted the motions to dismiss. He found that Complainant failed to timely appeal the adverse determination of her complaint against Carolina Power, even though she received notice of the determination, both constructively and actually. The ALJ also concluded that he lacked jurisdiction over the Shipyard because the Shipyard is not subject to the Act. Alternatively, he ruled that even if jurisdiction existed, the claim against the Shipyard must be dismissed as untimely filed.

On October 13, the Shipyard advised the ALJ that while it agreed with his decision to dismiss the claim, it had received additional information which could prove that Complainant's complaint was timely filed. The ALJ agreed, and by order dated November 17, he vacated that portion of the September 28 order setting forth his alternative holding on the timeliness of the

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claim against the Shipyard. The ALJ emphasized that his conclusion regarding jurisdiction remained in force. [1]

DISCUSSION

First, I agree with the ALJ that Complainant's claim against the Shipyard must be dismissed for lack of subject matter jurisdiction. It is well established that a necessary element of a valid ERA claim under the employee protection provision is that the party charged with discrimination be an employer subject to the Act. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *DeFord v. Secretary of*

Labor, 700 F.2d 281, 286 (6th Cir. 1983). Employers under the ERA are licensees, or applicants for a license, of the Nuclear Regulatory Commission, and their contractors and subcontractors. 42 U.S.C. § 5851(a); *Billings v. OWCP*, Case No. 91-ERA-0035, Sec. Final Dec. and Order, Sept. 24, 1991, slip op. at 2; *Wensil v. B.F. Shaw Co.*, Case Nos. 86-ERA-15, 87-ERA-12, 45, 46, 88-ERA-34, Sec. Order, Mar. 29, 1990, slip op. at 11, *aff'd sub nom. Adams v. Dole*, 927 F.2d 771, 776 (4th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3260 (U.S. Oct. 7, 1991). Because the Shipyard is a Department of Defense utilization facility, exempt from the Act's licensing requirement, *see* 42 U.S.C. §§ 2140, 2121 (1988), the complaint against the Shipyard lacks subject matter jurisdiction, and consequently, dismissal is mandatory. Fed. R. Civ. P. 12(h)(3); *Sullivan v. Afftrex, Ltd.*, Case No. 91-ERA-15, Sec. Order to Show Cause, Aug. 30, 1991, slip op. at 2, Sec. Final Order of Dismissal, Oct. 30, 1991.

I also agree with the ALJ's decision to grant Carolina Power's motion for dismissal on the basis of Complainant's failure to request a hearing following the preliminary determination of her complaint against it. 29 C.F.R. § 24.4(d)(2)(i). [2] While I disagree with Carolina Power's assertion that the five-day regulatory period for filing a request for a hearing is jurisdictional, *see Ward v. Bechtel Construction Inc.*, Case No. 85-ERA-9, Sec. Final Order, July 11, 1986, slip op. at 2; *cf. Flener v. Julius Kolesar, Inc.*, Case No. 86-STA-26, Sec. Final Dec. and Order, Mar. 10, 1987, slip op. at 2, dismissal is nonetheless proper here because the record taken as a whole raises no genuine issue of material fact so as to warrant a hearing. *See* 29 C.F.R. §§ 18.40, 18.41. *See also generally Celotex Corp. v. Catrett*, 477 U.S. 316, 322-24 (1986). The ALJ afforded Complainant ample time to secure legal counsel and to counter Carolina Power's argument on this critical issue, but she failed to do so. *Id.*

Specifically, the ALJ found that Complainant received actual notice and two forms of constructive notice of the adverse determination, yet failed to file an appeal. While I agree that on this record Complainant must be charged with constructive

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notice of the letter of determination, I do not accept the ALJ's findings that Complainant received constructive notice through notice to her attorney and that she received actual notice from Area Director, Jerry Stuckey.

First, with regard to the sufficiency of notice to Complainant's counsel, the ERA expressly provides that "the Secretary shall notify in writing the complainant (*and* any person acting in his behalf) . . . of the results of the [preliminary] investigation." 42 U.S.C. § 5851(b)(2)(A) (emphasis supplied). The provision is not written in the disjunctive as the ALJ stated, R.O. at 3. Furthermore, the record proves that at the time the letter of determination was issued, the attorney-client relationship did not exist. *See* Complainant's letter to Stephanie Glyder, dated March 1, 1987. Consequently, the ALJ's reliance on *Harper v. Burgess*, 701 F.2d 29 (4th Cir. 1983), in finding that notice

to Complainant's counsel constituted notice to Complainant, is misplaced. *Cf. also Decker v. Anheuser-Busch*, 632 F.2d 1221, 1222 n.3 and 1223-24 (5th Cir. 1980).

Secondly, the record does not establish that Complainant received actual notice of the determination letter from Stuckey. The only source of this information is counsel for Carolina Power, who made the assertion and argument in his motion for dismissal. Carolina Power and Light Company's Motion to Dismiss at 4-5, 7-8. Consequently, there is no "evidence" to support the ALJ's finding. *See Peoples v. Brigadier Homes, Inc.*, Case No. 87-STA-30, Sec. Dec. and Order, June 16, 1988, slip op. at 4-5.

I agree, however, that Complainant received constructive notice of the determination letter upon the certified mailing of the letter to her. The applicable regulation requires only that notice of the preliminary determination be given to the complainant by certified mail. 29 C.F.R. § 24.4(d)(1). The letter of determination at issue here was sent by certified mail to Complainant's correct home address; the post office notified Complainant twice of attempted delivery, on March 9 and again on March 19; but the letter was eventually returned "unclaimed" on March 24. Although the regulations at 29 C.F.R. Part 24 do not address the circumstance of an unclaimed determination letter, the ALJ's conclusion finds support in the regulations at 29 C.F.R. Part 18 (1991), which are generally applicable to adjudicatory proceedings conducted before the Office of Administrative Law Judges. *See* 29 C.F.R. § 18.1(a). Section 18.3(d) provides that if a complaint is served by certified mail, service is complete upon mailing to the last known address. In addition, 29 C.F.R. § 18.1(a) provides that the Federal Rules of Civil Procedure apply in the absence of any other controlling provision, and Fed. R. Civ. P. 5(b) provides that service of pleadings and other papers by mail is "complete upon mailing."

Accord Anderson v. United States, 724 F.2d 608, 611 (8th Cir. 1983); *Anthony v. Marion County Gen. Hosp.*, 617 F.2d 1164, 1168 n.5 (5th Cir. 1980), citing 4A C. Wright & A. Miller, Federal Practice & Procedure: Civil 2d § 1148 (1987). [3] Since Complainant has not proffered any explanation for her failure to request a hearing on the determination, dismissal is appropriate. *See Ward*, slip op. at 2.

After detailed review of the record, however, it appears that Complainant may not have been properly notified of the ALJ's recommended decisions and, thus, may have been deprived of an opportunity to respond. *Id.* Neither the ALJ's recommended decisions nor the Secretary's Order Establishing Briefing Schedule were mailed to Complainant's "last known address," as specified in the regulations. 29 C.F.R. § 18.3(c); *see* 29 C.F.R. § 24.6(a). Although the record contains no direct communication from Complainant regarding a change in her address, the return receipt on the Notice of Hearing indicated a new address for Complainant at least as of August 19, 1987. The record does not reflect that the ALJ's decisions and the briefing schedule were mailed to this

new address. [4] While it is incumbent upon a party to keep the Department of Labor directly apprised of his or her current mailing address, I cannot ignore evidence of a new address which enters the record indirectly. Accordingly, in order to ensure a fair opportunity for response, this order, with the ALJ's recommended decisions attached, is served by certified mail to the "last known address" of the parties. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). The parties are ordered to show cause within ten days of receipt hereof why this case should not be dismissed in accordance with this decision. If the parties fail to show cause as prescribed herein, an order will be issued dismissing the case.

SO ORDERED.

LYNN MARTIN
Secretary of Labor

Washington, D.C.

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[ENDNOTES]

[1] The ALJ did not discuss the remaining arguments raised by the parties in their motions to dismiss, *see supra* at 3, nor did he rely on 29 C.F.R. § 24.5(e)(4)(b), as later urged by Carolina Power. In light of my conclusions regarding disposition of this case, I also decline to address these arguments.

[2] Section 24.4(d)(2)(i) provides that the determination shall become the final order of the Secretary denying the complaint unless within five calendar days of its receipt, the complainant files by telegram a request for a hearing.

[3] In accordance with Section 24.4(d)(2)(i), the notice of determination properly informed Complainant of her right of appeal and the consequences of inaction, and it clearly explained that the determination involved *only* her allegation against Carolina Power.

[4] The R.O. was returned to the ALJ unclaimed, marked "NOTIFY SENDER OF NEW ADDRESS," and reflecting the same new address indicated on the return receipt for the Notice of Hearing. While the return receipt for the Order Establishing Briefing Schedule was signed by Obi as agent, I am reluctant to accept his authority to act in that capacity in light of the evidence indicating Complainant's change in address and Complainant's June 25 letter in which she expressly disapproved of receipt by an agent.